80-1532

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ALEXANDER L. STEVAS,
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BILLY JOE ENTREKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari
to the
United States Court of Appeals for the
Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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70130
[504] 581-1973

Attorney for Petitioner

THE ISSUE PRESENTED

Whether, in view of this Court's decision in Trammel v. United States, 445 U.S. 40 (1980), which held that a marital privilege exists on the part of the witness spouse with regard to acts of the party spouse and declarations made in the presence of third persons but approved the rule of Blau v. United States, 340 U.S. 332 (1951), and Wolfe v. United States, 291 U.S. 7 (1934), that the verbal communications between a husband and wife are "privileged under the independent rule protecting confidential marital communications," the said privilege being exercisable by the party spouse to prevent testimony, the Court below erred and denied petitioner's marital privilege when it affirmed the petitioner's conviction obtained in large part on the basis of his wife's testimony, given over petitioner's objection that it violated his privilege, on the basis that its

prior decision, in United States v. Mendoza, 574 F.2d 1373, 1381 (5 Cir.), cert. den., 439 U.S. 988 (1978), recognized an exception to the marital privilege even for confidential verbal communications when the witness spouse is alleged to be a co-conspirator and the communications are made in the course of an alleged conspiracy with the party spouse.

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Billy Joe Entrekin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceedings on November 3, 1980, which affirmed the judgment and sentence imposed in these proceedings by the Uni-

ted States District Court for the Eastern District of Louisiana, Honorable Robert F. Collins, Judge presiding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 624 F.2d 597. That opinion is reproduced herein at Appendix A, p.A-1 et seq., infra.

There was no written opinion of the Panel or of the Fifth Circuit en banc accompanying the denial of petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. A Table entry reporting the denial of rehearing is published at 629 F2d 1350, and is reproduced herein at Appendix B, p.A-7, infra.

There were no relevant written opinions of the District Court herein.

GROUNDS ON WHICH SUPERVISORY JURISDICTION OF THIS COURT IS INVOKED

The opinion of the Fifth Circuit Court of Appeals was rendered on Au-

gust 20, 1980 (Appendix A, p.A-1 et seq., infra) and entered in these proceedings on October 24, 1980 (Appendix B, p.A-7, infra) when the Court denied a timely petition for rehearing and suggestion for rehearing en banc.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). See, also, Trammel v. United States, 445 U.S. 40 (1980); Blau v. United States, 340 U.S. 332 (1951); Wolfe v. United States, 291 U.S. 7 (1934).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 501, Federal Rules of Evidence (F.R.Evid.), in relevant part provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to the statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason

and experience. * * *

STATEMENT OF THE CASE

Petitioner, the Commissioner-at-Large of the Lafourche Basin Levee District of Louisiana, was charged in an indictment filed in the United States District Court for the Eastern District of Louisiana with five counts of mail fraud (18 U.S.C. §1341), one count of conspiracy to commit mail fraud (18 U.S.C. §371), and one count of perjury before the grand jury (18 U.S.C. §1623). (R.1-18) The said District Court had jurisdiction over these proceedings. 18 U.S.C. §3231.

A. Statement of Course of Proceedings and Disposition of the Case

Billy Joe Entrekin, the Commissioner at Large of the Lafourche Basin Levee District of the State of Louisiana, was indicted by a grand jury and charged with one count of conspiracy to commit mail fraud, five counts of mail fraud and one

count of perjury before the grand jury. (R. 1-18) The alleged fraud was the violation of defendant's official fiduciary duty as Commissioner of the Levee District by allegedly agreeing to accept money to persuade the said Levee District to purchase a piece of land in Jefferson Parish, Louisiana, for recreational facilities which, after improvements were made thereon, was to be leased to the Jefferson Parish Council for $1.00 per year on the condition that the said parish maintain the property and develop it fully into a recreational facility. The alleged prime co-conspirator was Commissioner Ivy McDonald, whose alleged role was to second Commissioner Entrekin's motion to purchase the land and he was allegedly offered $30,000.00 by Commissioner Entrekin for doing so. The mail fraud counts related to mailings incidental to the alleged scheme. The al-

leged false statements to the grand jury related to denials by Commissioner Entrekin of the existence of the alleged kickback scheme and other statements relating to the concealment or expenditure of funds allegedly obtained by him pursuant to the alleged kickback scheme.

Commissioner Entrekin was arraigned and pleaded not guilty to each of the charges made by the grand jury. (R. 41)

This matter was tried to a jury between September 17 and 20, 1979. At the commencement of the trial, several evidential rulings were made in limine. The Government sought and was permitted to call Commissioner Entrekin's ex-wife as its witness to testify about statements made to her by Commissioner Entrekin as well as acts committed by him in her presence. The defense asserted that the defendant's statements made to his wife during the course of their marriage,

not in the presence of third parties were confidential marital communications which were privileged and could not be used in evidence against him over his objection. The privilege was held by the Trial Court not to be a bar to the testimony of Mrs. Entrekin because (1) the marriage had ended in divorce and (2) Mrs. Entrekin was a co-conspirator in the alleged offenses. (Tr. 3-28) The Court permitted much testimony of Mrs. Entrekin about private conversations with Commissioner Entrekin relative to the facts of this case, which testimony covered virtually every count of the indictment.

The jury returned a verdict of guilty of conspiracy to commit mail fraud, three counts of mail fraud and one count of perjury before the grand jury. The jury acquitted defendant of two counts of mail fraud.

The Trial Court sentenced Commis-

sioner Entrekin to serve a total of one year in the custody of the Attorney General and to pay a total fine of $20,000 on the five counts of which he was convicted. On the conspiracy and perjury counts, defendant received sentences to one year incarceration and a $10,000.00 fine, the periods of incarceration to be served concurrently but the fines to be cumulative. On the three counts of mail fraud, the Trial Court sentenced defendant to serve one year on each, concurrently with the sentence imposed on Count I, but suspended six months of each of those sentences and placed defendant on probation for three years commencing with his release from incarceration. (R. 139)

The Court of Appeals affirmed the judgment and subsequently denied petitioner's application for rehearing and suggestion for rehearing en banc.

B. Statement of the Facts Relevant to this Petition

Very little of the testimony of Mattie Willie Entrekin, defendant's ex-wife, pertained to acts of the defendant. The acts about which she testified were the bringing of $40,000.00 into the Entrekin residence on a particular date, the counting of that money and listing the serial numbers on two sheets of paper, and the purchase of $22,000.00 worth of public utility bonds. No objection was made with regard to her testimony about these acts. The source of the $40,000.00 and the source of the $22,000.00, about which Mrs. Entrekin testified, was information she had derived from the confidential marital relationship existing between them. The defense did object to Mrs. Entrekin testifying with regard to information disclosed to his former wife in the confidence of their marital relationship. The following examples are illustrative.

During the course of the testimony of Mrs. Entrekin, the prosecutor asked (Tr. 267):

> Q. Are you familiar with the Board of Commissioners for the Lafourche Basin and Levee District purchasing some land in Jefferson Parish?
>
> A. Yes, I am.
>
> Q. How do you have knowledge of that?
>
> A. It was through my husband, Billy Joe Entrekin.

At that time, defense counsel asked leave to approach the Bench and make the following precise objection on the record (Tr. 267):

> Your Honor, at this time we lodge an objection to the testimony of this witness concerning matters that were given to her in the confidentiality of the marital relationship by her former husband during the period of time in which they were married, and raise again the issue of spousal privilege, which was raised in chambers during certain pre-trial proceedings. * * *

The Trial Court again ruled (Tr. 267-268):

> that the matters about which the witness will testify are not matters within the spousal privilege. The Court feels it is bound by the Fifth Circuit ruling in United States v. Mendoza, and the Court will hold that the matter about which the witness will testify concerns crimes in which the husband and wife were jointly participating, and that these are not within the marital privilege. They are not marital communications within the purpose of the marital privilege, so therefore the Court will hold that these are not matters which should be protected.

When the examination of Mrs. Entrekin resumed, every question and every answer from page 269 through line 9 of page 271 asked for hearsay information which had been received by Mrs. Entrekin from the defendant, in confidence, during the course of their marriage. On page 273 of the transcript, the Government continued to elicit hearsay information from the witness which could only have been learned by her from her husband in the confidence of their marital relationship. There is no evidence in this

record to support a conclusion that Mr. and Mrs. Entrekin ever spoke in the presence of any third party about anything relative to the charges made herein. On page 273, line 24 of the transcript, the question, "How did he tell you he was going to make some money if the Board purchased this land?," was asked. The next question was: "Did he tell you why they were willing to pay him $40,000.00?" (Tr. 274) Then the Government asked the following question calling for Mrs. Entrekin to state what her husband told her: "Did he tell you that he needed the assistance of any other Commissioners on the Board?" (Tr. 274) Persisting in delving into the communications between Mr. and Mrs. Entrekin during this time they were married, the prosecutor asked: "Getting back to what Mr. Entrekin told you about the $40,000.00, from whom did he tell you he was going to get the mon-

ey?" (Tr. 277) The next question was: "Did Mr. Entrekin tell you how Mr. Vicarri was going to raise the $40,000.00?" (Tr. 278) Then, the prosecutor asked, "Was Ivy McDonald to receive any of the $40,000.00?" (Tr. 278) Then, the prosecutor called for the witness' conclusion, the only basis for which could have been a communication between Mr. and Mrs. Entrekin: "Why was he to receive part of this money?" (Tr. 278) The testimony to which the above reference is made involved eighteen of the thirty-five pages of Mrs. Entrekin's direct examination. Those examples cited are typical, but not exhaustive, of the different times when the Government, on direct examination pursuant to the ruling of the Court, was permitted to adduce testimony concerning the confidential communications between Mr. and Mrs. Entrekin during their marriage. Mrs. Entrekin answered each of

the above questions asked, providing the Court and jury with information concerning the confidential marital communications of the defendant to his former wife.

REASONS FOR ALLOWING THE WRIT

THE COURT BELOW HAS RENDERED AN OPINION IN THIS CASE WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The District Court held that statements made by petitioner to this former wife during the course of their marriage were admissible over petitioner's objection that such testimony from his wife was privileged from disclosure even if she consented to such disclosure because (1) the marriage had terminated in divorce and (2) Mrs. Entrekin was an alleged co-conspirator with petitioner in the alleged mail fraud scheme. The Court of Appeals followed its previous opinion in United States v. Mendoza, 574 F.2d 1373, 1381, reh. den., 579 F.2d 644 (5

Cir.), cert. den., 439 U.S. 988 (1978), which held:

> that conversations between husband and wife about crimes in which they are jointly participating when the conversations occur are not marital communications for the purpose of the marital privilege, and thus do not fall within the privilege's protection of confidential marital communications.

In United States v. Trammel, 583 F.2d 1166, 1169 (10 Cir. 1978), affd on other grounds, 445 U.S. 40 (1980), the Tenth Circuit held:

> a defendant husband who has jointly participated in a criminal conspiracy with his wife cannot prevail upon his claim of the marital privilege when his wife gives incriminating testimony under grant of immunity.

In Trammel v. United States 445 U.S. 40, 100 S.Ct. 906, 908 (1980), this Court noted:

> the District Court ruled that Mrs. Trammel could testify in support of the Government's case to any act she observed during the marriage and to any communication "made in the presence of a third person"; however, confidential communications between petitioner and his wife were held to be privileged and inadmissible. * * * (Emphasis added.)

Since the party's right to exclude confidential marital communications was not at issue in Trammel because the District Judge properly excluded such testimony from the witness spouse, it might be argued that the following language in this Court's decision in Trammel was obiter dictum (445 U.S. at ___, 100 S.Ct. at 912-913):

> It is essential to remember that the Hawkins [v. United States, 358 U.S. 74 (1958)] privilege is not needed to protect information privately disclosed between husband and wife in the confidence of the marital relationship--once described by this Court as "the best solace of human existence." Stein v. Bowman, [38 U.S.] 13 Pet. [207], at 223 [(1839)]. Those confidences are privileged under the independent rule protecting confidential marital communications. Blau v. United States, 340 U.S. 332 (1951); see n.5, supra. The Hawkins privilege is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons.

Petitioner respectfully submits that the above quoted statement of this Court was

not dictum at all, but, if it was, it was judicial dictum, rather than obiter dictum, Cf. 21 C.J.S. Courts §190c, pp. 316-317 (1940) (Blackletter Summary and accompanying text). "A judicial dictum is entitled to much weight, and should be followed unless found to be erroneous."

Petitioner respectfully contends that the above-quoted statement from this Court's Trammel decision was not dictum at all but was, instead, an adjudication on a point within the issues of the case and the Court below was bound thereby. See 21 C.J.S. Courts §190b, p. 314 (1940) (Blackletter Summary); Woods v. Interstate Realty Co., 337 U.S. 535, 537-538 (1949). The issue posed by the Trammel case, as it was decided by the Tenth Circuit, was whether the so-called "co-conspirator exception" to the marital privilege rule existed. This Court's opinion completely negates any view that

the "co-conspirator's exception" to the rule of marital privilege exists. With regard to the acts and non-confidential communications (i.e., communications between a husband and wife made in the presence of a third person), this Court held that the Hawkins rule "should be modified so that the witness spouse above has a privilege to refuse to testify adversly; the witness may be neither compelled to testify nor foreclosed from testifying." 445 U.S. at ___, 100 S.Ct. at 914. If a "co-conspirator exception" existed, the witness spouse would not have been granted an absolute right to refused to testify adversely to the party spouse.

If judicial dictum, the above quoted statement approving the "independent rule" of Blau v. United States in cases involving confidential marital communications and noting the distinction be-

tween cases involving spousal testimony about acts and non-confidential communications, was correct and should be followed in this case.

The lower federal courts have recognized the existence of two distinct marital privileges: (1) the anti-marital or "adverse spousal testimonial privilege", and (2) the "confidential marital communications privilege." United States v. Mendoza, 574 F.2d 1373 (5 Cir. 1978), cert. den., 439 U.S. 988 (1978); United States v. Cameron, 556 F.2d 752 (5 Cir. 1977); United States v. Allery, 526 F.2d 1362 (8 Cir. 1975); United States v. Harper, 450 F.2d 1032 (5 Cir. 1971); United States v. Nelson, 485 F. Supp. 941 (.D.Mich. 1980). In so doing, they have merely followed this Court's decisions in Blau, Wolfe v. United States, 291 U.S. 7 (1933); Hawkins, Pereira v. United States, U.S. 1 (1954); and Wyatt

v. United States, 362 U.S. 525 (1960).

A distinction has been recognized in the duration of the privileges. The adverse spousal privilege does not exist after divorce; whereas, the confidential marital communications privilege does not terminate upon divorce. Pereira v. United States, supra; In re Grand Jury Investigation, 603 F.2d 786 (9 Cir. 1979); United States v. Lilley, 581 F.2d 182 (8 Cir. 1978); United States v. Bolzer, 556 F.2d 948 (9 Cir. 1977); Barksy v. United States, 339 F.2d 180 (9 Cir. 1964).

The adverse spousal privilege is far broader than the confidential marital communications privilege. The former bars all testimony while the latter bars only testomony about confidential communications. This Court's decision in Trammel, permitting only the testifying spouse to claim the adverse spousal tes-

timony privilege, is justified by the considerations of the public and private aspects of the marital union and the need for effective law enforcement. Those same considerations, however, weigh in favor of the maintenance of the privilege in the party spouse and/or the witness spouse where confidential communications are concerned. The reallocation of the privilege in adverse spousal testimony cases, allowing the witness spouse to decide whether or not to testify about the acts and non-confidential communications of the other spouse, effectively balances the needs of law enforcement with the needs of the public and spouses in the course of marriage.

This Court, in Pereira, held that the few confidential communications about which the witness wife testified had so slight an effect as to have been immaterial. The error in the instant case of

admitting such communications over petitioner's objection cannot similarly be regarded as harmless. Mrs. Entrekin's testimony covered virtually every count of the indictment. Her testimony about confidential communications with the petitioner was the only evidence of one or more elements of all the offenses with which petitioner was convicted.

In conclusion, the Court below, during oral argument, relied upon the fact this Court had denied a petition for a writ of certiorari in the Mendoza case, 439 U.S. 988 (1978), after this Court's decisions in Blau and Wolfe. This Court has frequently acknowledged that it allows patently erroneous convictions to stand simply because the lower courts have not sufficiently handled the problem for this Court to get involved; the record is not adequately developed for this Court to take the case; and for other

reasons unrelated to the merits. No solace can be taken from the denial of writs in Mendoza. Frankly, we submit, as this Court probably perceived in Mendoza, that the judgment was correct and only the opinion was wrong. Mendoza involved tape recorded conversations which were not surreptiously obtained. One of the spouses taped the conversations. Adducing those tape recordings in evidence violated no testimonial privilge. The tapes were documentary evidence. The tape recorder could even have been regarded as a third person since the primary objective in using such an instrument is to record what was previously said for others to hear. The rationale of Mendoza is erroneous. The facts of that case are nothing like those here. Mrs. Entrekin was permitted to testify against her former husband about confidential communications. Where there is

no showing that the witness spouse's knowledge came from a source other than confidential communications with the other spouse, the testimonial privilege exists. In re Grand Jury Investigation, supra. Communications between spouses are assumed to be confidential, hence privileged. Wolfe v. United States, supra.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari and, after plenary consideration herein, this Court should reverse the judgment below and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. McPherson, Attorney of Record for the petitioner in the above styled cause and a Member of the Bar of the Supreme Court of the United States, certify that I have served three copies of the foregoing Petition for a Writ of Certiorari upon the Solicitor General of the United States, first class postage prepaid, this ____ day of February, 1980.

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APPENDIX "A"

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BILLY JOE ENTREKIN,

Defendant-Appellant,

No. 79-3649.

United States Court of Appeals,
Fifth Circuit.

Aug. 20, 1980.

Rehearing and Rehearing En Banc
Denied Oct. 24, 1980.

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

Billy Joe Entrekin appeals his convictions on three counts of mail fraud, one count of conspiracy to commit mail fraud, and one count of perjury before the grand jury. We affirm.

Entrekin contends first that the district court erred by permitting his former wife, over his objection, to give testimony that he claims was based on confidential marital communications. The marital privilege recognized at common law represents two distinct and independent privileges. The first bars one spouse from testifying adversely to the other. The second bars the spouse from testifying as to the confidential marital communications of the other. See United States v. Mendoza, 574 F.2d 1373, 1379 (5th Cir.), cert. denied, 439 U.S. 988 99 S.Ct. 584, 58 L.Ed.2d 661 (1978); United States v. Cameron, 556 F.2d 752, 755 (5th

Cir. 1977); United States v. Harper, 450 F.2d 1032, 1045 (5th Cir. 1971). Entrekin recognized the Supreme Court's recent decision in Trammel v. United States, ___ U.S. ___, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980), and makes no claim based on the first privilege. Rather, he confines his argument to the claim that his former wife testified as to the confidential marital communications that remain privileged after Trammel. See id. at ____, 100 S.Ct. at 912-13, 63 L.Ed.2d at 194-195. There is no merit to this contention.

This court previously had held "that conversations between husband and wife about crimes in which they are jointly participating when the conversation occur are not marital communications for the purpose of marital privilege, and thus do not fall within the privilege's protection of confidential marital communica-

tions." United States v. Mendoza, 574 F.2d at 1381. The record discloses both that all challenged conversations between Entrekin and his former wife are made in furtherance of the conspiracy to commit mail fraud and that, from the first conversation, Entrekin's former wife was an active participant with Entrekin in that conspiracy. The conversations testified to by Entrekin's former wife fall squarely within the exception to privileged marital communications created by Mendoza[1] and properly were admitted by the district court.

---

1. Entrekin's counsel conceded at oral argument that Trammel does not address that portion of the marital privilege that protects confidential marital communications from disclosure. Accordingly, Trammel does not affect the validity of our prior holding in Mendoza that excludes from the scope of protected, confidential marital communications "conversations between husband and wife about crimes in which they are jointly participating when the conversations occur."

Entrekin next contends that the district court erred by refusing to permit him to use his former wife's prior conviction for shoplifting for the purpose of impeachment. A party may attack the credibility of a witness by introducing evidence that the witness previously has been convicted of a crime provided the crime "was punishable by death or imprisonment in excess of one year" or "involved dishonesty or false statement." Fed.R.Evid. 609(a). The district court properly exluded evidence of the witness' prior conviction for shoplifting because the crime neither was punishable by death or imprisonment in excess of one year nor involved dishonesty or false statement within the meaning of Fed.R.Evid. 609(a)(2). See La. Rev.Stat.Ann. §14:67 (West 1974); United States v. Ashley, 569 F.2d 975, 978-79 (5th Cir.) cert. den., 439 U.S. 853, 99

S.Ct. 163, 58 L.Ed.2d 159 (1978). See also United States v. Barnes, 622 F.2d 107, 110 (5th Cir. 1980).

Entrekin lastly contends that the district court erred by refusing to give a requested instruction based on Bronston v. United States, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), and by denying his motion for a judgment of acquittal. The record in this case clearly demonstrates that both contentions are totally without merit.

AFFIRMED.

APPENDIX "B"

DENIALS OF REHEARING EN BANC

* * * * * *

U.S. v. Entrekin . .79-3649 Den.

10/24/80

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